IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1220~~ 133

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals For the Ninth Supreme Judicial District of Texas

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Petitioner, Parris Sinkler, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, entered in the above entitled case on November 1, 1956.

Citations to Opinions Below

The opinion of the Court of Civil Appeals (R. 195), printed in Appendix "A" hereto, p. 13, is not officially reported but is printed in 295 S.W. 2d 508. The Supreme Court of Texas wrote no opinion in refusing petitioner's application for a writ of error.

Jurisdiction

The judgment of the Court of Civil Appeals was entered on November 1, 1956 (R. 207). A timely motion for rehearing, filed on November 14, 1956, was overruled on November 28, 1956 (R. 210). Petitioner's application for writ of error to the Supreme Court of Texas, timely filed on December 27, 1956 (R. 212) was refused, no reversible error, on February 6, 1957, and a timely motion for rehearing on that application was overruled on February 27, 1957 (R. 224). The Court of Civil Appeals thus became, in this case, the highest court of the State in which a decision could be had. *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) because the petitioner's cause of action is under the Federal Employers Liability Act, 35 Stat. 65, 45 U.S.C., Sections 51, et seq. and because the Court of Civil Appeals has decided a question of substance under that Act not heretofore determined by this Court and decided it in a way probably not in accord with applicable decisions of this Court.

Questions Presented

All of the switching operations of respondent railroad and its predecessor in title and responsibility, Guy A. Thompson, Trustee (R. 228) at Houston, Texas were performed by Houston Belt & Terminal Railway Company (R. 109), a corporation affiliated with and partially owned by respondent (R. 107). Petitioner, while engaged in the performance of his duties as an employee of respondent's said predecessor, Guy A. Thompson, Trustee, was injured by the negligence of a switching crew handling the car in which petitioner was working (R. 52). For convenience,

both respondent and Thompson, Trustee, will be referred to hereinafter as "respondent". The questions presented are:

1. Whether respondent can exempt itself from liability under the Federal Employers Liability Act, 35 Stat. 65, 66, 45 U.S.C., Section 51, et seq., by delegating the performance of its switching operations to a terminal company partially owned and effectively controlled by it.

2. Whether the "necessary operation and effect" of respondent's delegation of its switching operations to Houston Belt & Terminal Railway Company was to defeat "the liability which the statute was designed to enforce" within the meaning of this Court's interpretation of Section 5 of the Federal Employers Liability Act, 35 Stat. 66, 45 U.S.C., Section 55, in *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603, 613.

3. Whether respondent is liable to petitioner for the negligence of a switching crew of a terminal company to which respondent has entrusted the performance of its switching operations, said operations being a portion of its function of transportation, which it is obliged to perform under the Interstate Commerce Act, Section 1, paragraphs (3), (4) and (18), 41 Stat. 474, 49 U.S.C., Section 1 (3), (4) and (18).

4. Whether the Court of Civil Appeals in this case had the power to reverse the trial court's judgment for the petitioner, which was based upon an express jury finding that Houston Belt & Terminal Railway Company was acting as respondent's agent in performing the switching operation in which petitioner was injured. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 1 L. Ed. 2d 404, 407-408.

Statutes Involved

The statutory provisions involved are Sections 1 and 5 of the Federal Employers Liability Act, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sections 51 and 55, and paragraphs (3), (4) and (18) of Section 1 of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C., Section 1 (3), (4) and (18). They are printed in Appendix "B" *infra*, pp. 28-31.

Statement

Petitioner was the Negro cook on the private car assigned to respondent's General Manager (R. 43). On March 30, 1949, the car, carrying petitioner and the General Manager among others, returned to Houston from a trip (R. 49). While it was being switched from one track to another in the Union Station at Houston, and while petitioner was engaged in the performance of his duties as a cook, the car was slammed violently into another car and petitioner was severely injured (R. 52). There is no question on appeal about the negligence of the switching crew (R. 33).

The switching crew were on the payroll of Houston Belt & Terminal Railway Company (hereinafter referred to as "Belt") (R. 76), but the contract in effect between respondent and Belt at the time of the accident provided, in Article III, Section 2 thereof, as follows:

> "If any officer or employee of the Terminal Company shall be deemed by any of the railway companies to be incompetent, negligent, or guilty of unfairness or discrimination, or otherwise unfit for the performance of his duties, such railway company or companies may deliver to the Terminal Company a written demand for the removal of such officer or employee, and thereupon the Terminal Company shall dismiss

such officer or employee within the time mentioned in such demand." (R. 112)

Further, respondent owned 50% of the stock of Belt (R. 107) and appointed four of its eight directors (R. 124). Various employees of respondent also served (sometimes without additional compensation) as employees of Belt (R. 139, 162, 176). There was also evidence that the business of Belt with the railroads other than those owning a part of its stock was conducted in such a way as to advance the interests of the stockholding lines rather than the interest of Belt itself (R. 178-181).

No specific contract for the performance of "switching operations" by Belt, effective at the time of the accident, appears in the record, although there is evidence of a new contract effective June 1, 1950, more than a year after the accident, which, in apparent recognition of the pre-existing situation (R. 160, 192) specifically provides that Belt will perform switching operations for respondent as its *agent* (R. 116, 137).

Petitioner did not consult counsel until more than two years after his accident, and then learned that any action against Belt was barred by the applicable Texas statute of limitations (R. 80-83), but that he could sue his employer within three years from the date of the accident under the Federal Employers Liability Act. Accordingly, he brought this action on March 21, 1952.

The petition in the trial court expressly alleged that respondent was engaged as a common carrier by railroad in commerce between the several states and with foreign nations (R. 4-5) and that the duties of plaintiff in which he was engaged at the time of his injuries affected interstate and foreign commerce directly, closely and substanti-

ally (R. 6), thus alleging a cause of action under 45 U.S.C., Section 51.

Respondent's only defense now material was that Belt acted as an indeupendent contractor in performing switching for respondent, and that respondent was therefore not liable for the negligence of Belt's crew (R. 33-34). As stated above, no contract effective at the time of the accident covering the performance of switching operations was introduced in evidence.

There was general testimony, principally by employees of Belt, about the manner in which its operations were carried on (R. 106-109, 123-138, 186-192). Petitioner introduced evidence of statements made by respondent in proceedings before the Interstate Commerce Commission in *Houston Belt & Terminal Ry. Co. Control, etc.*, Finance Docket 16592, 275 I.C.C. 289 (R. 116-118), portions of the opinion of the Commission in that case (R. 119-120) and a provision in the contract governing the Belt's operations which was approved in that case and placed in effect June 1, 1950 (R. 116) all tending to show that the parties and the Commission regarded and characterized the relationship at all times material here, between respondent and Belt as one of agency.

The trial court, in accordance with Texas practice, elicited from the jury special findings that, upon the occasion in question, Belt was acting as respondent's "agent" and not as an "independent contractor" (R. 25). On these findings, the trial court entered judgment for petitioner (R. 31-32).

The Court of Civil Appeals, in reversing that judgment and rendering judgment for respondent, held in effect that Belt, as a matter of law, was acting as an independent con-

tractor and that respondent was not liable for its negligence (R. 206). Upon motion for rehearing, petitioner expressly pointed out (R. 208-209) the errors of the Court with respect to the proper application of Sections 1 and 5 of the Federal Employers Liability Act. These same points were repeated in the application for writ of error to the Supreme Court of Texas (R. 215-216).

Reasons for Granting the Writ

The judgment of the Court of Civil Appeals, if allowed to stand, effectively deprives railroad employees in petitioner's situation of the protection of the Employers Liability Act, and relegates them to actions for damages under State law against a third party, subject to defenses not available under the Act, and frequently governed by a different statute of limitations. This result is clearly not in accordance with the intent of Congress, and should not be allowed to stand.

The performance of switching operations is a part of the function of transportation which respondent is bound to perform. See Section 1 (3), (4) and (18) of the Interstate Commerce Act, 49 U.S.C., Section 1 (3), (4) and (18). It has uniformly been held that a common carrier by railroad has no power to delegate the performance of any portion of its function of transportation to others in such a way as to relieve itself of liability, especially liability to its employees and passengers. *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.A. (N.S.) 1196, 1199; *G. C. & S. F. Ry. Co. v. Shelton*, 96 Tex. 301, 316-17, 72 S.W. 165; *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U.S. 84; *Panhandle & S. F. Ry. Co. v. Crawford* (Tex. Civ. App.), 198 S.W. 1079,

1081; *Peters v. St. Louis, San Francisco Ry. Co.*, (Mo. App.) 131 S.W. 917, 921-922; *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735, 93 S.E. 560, 10 A.L.R. 1411, 1417.

In the *Floody* case the plaintiff was the employee of the Omaha company which operated into and out of a union depot in St. Paul owned and controlled by the Union Depot Company, a separate corporation. While riding on one of defendant's engines plaintiff was injured by the negligent operation of a switch by employees of the Depot Company. Defendant there raised precisely the same question as respondent here. The court disposed of that defense as follows:

> "We are satisfied that, as between the Omaha Company and the plaintiff, the company accepted the services of the switchman on that particular occasion to the same extent as though he had been in its employ.
>
> "Conceding that, under the contract between the Union Depot Company and the Omaha Company, the latter was required to take its trains out of the depot over the switches in the manner directed by the switch tenders in the employ of the Union Depot Company, yet that fact did not discharge the railroad company from the contract relation which it assumed as between itself and plaintiff. The test of liability is not determined by the fact that the switch tenders were in the employ and under the control of the Union Depot Company, and that, by virtue of the contract between the switchmen and that company, the relation of *respondeat superior* existed. The Omaha company owed the duty to plaintiff to use all reasonable diligence to carry him safely in its engine out of the depot yards, and it was immaterial to plaintiff whether in so doing defendant operated its train over

its own tracks and switches, over the tracks and switches which it had leased from another company, or under a contract with the Union Depot Company. It was immaterial to plaintiff that the switchmen were paid by the Union Depot Company, and were under its control in operating the switches, if, for the occasion, the Omaha Company chose to avail itself of the services of that company and its employees for the purpose of taking its train out of the depot." (p. 1199 of 13 L.R.A. (N.S.)).

In the *Shelton* case, a passenger rather than an employee was involved, but we consider the principle indistinguishable. There the plaintiff was a passenger on a train of the Gulf, Colorado & Santa Fe Railway Company, and was injured by the negligence of a switching crew of the Atchison, Topeka & Santa Fe which was switching the Gulf car by virtue of an arrangement between the two companies. The Supreme Court of Texas upheld a judgment for the plaintiff in the following language:

"It is contended by the plaintiff in error that the persons who had charge of the train at the time Shelton was injured were the servants of the Atchison, Topeka & Santa Fe Railway Company, for whose acts plaintiff in error is not liable. The facts show without dispute that the switching crew which had charge of the train, one member of which gave the direction to the plaintiff to leave the car, was employed by the Atchison, Topeka & Santa Fe Railway Company; that they performed the yard work for both companies at the point of connection at Purcell, and were paid by the company which employed them, the plaintiff in error paying to the other company one-half of the cost. There was no evidence of the terms of the contract between the two railroads concerning their joint business at that station. Under this state of facts the men of the switching crew were

> equally the servants of both companies and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it." (pp. 316-317, 96 Tex.)

The general principle involved in this situation is stated as follows in *Restatement of Torts*, Section 428:

> "An individual or a corporation carrying on an activity which can be lawfully carried on under a franchise granted by public authority and which involves an unreasonable risk of harm to others is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to work in carrying on the activity."

The opinion of the Court of Civil Appeals neither clearly states nor properly analyzes the fundamental problem here. No authority cited by it is in point, and it neither cites nor discusses any authorities urged by the petitioner in support of his position. No authority, in point on the facts, has been cited by respondent or found by petitioner which would support the judgment of the Court of Civil Appeals.

Even if respondent had in fact made a contractual arrangement with Belt (and no such contract appears in this record) which made Belt an independent contractor in the performance of switching operations and was otherwise sufficient to relieve respondent of its liability to petitioner, such arrangement would be void as to petitioner under the terms of Section 5 of the Employers Liability Act. It has been suggested by respondent below, and is evidently implied by the opinion of the Court of Civil Appeals, that if such an arrangement were one which the parties had charter power to make and were entered into as a normal business arrangement, it would not be subject to Section 5. That argument was long disposed of by this Court in

Philadelphia, Baltimore & Washington R. R. Co. v. Schubert, 224 U.S. 603, 613, in which Mr. Justice Hughes, speaking for an unanimous Court, wrote as follows:

> "It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of Section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, cannot be doubted. The words 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contract and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

Finally, respondent's defense that Belt was not its agent was submitted to and decided against it by the jury (R. 25). The Court of Civil Appeals undertook to set aside the jury's findings in this regard as being without support in the evidence (R. 201-202). But it is clear that those findings were conclusive, if there was evidence to support them. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. ____, 1 L. Ed. 2d 404, 407-408. The fact that respondent owned 50% of the Belt's stock and appointed four of its directors (R. 107, 124), that various employees of respondent served also, sometimes without additional compensation, as employees of Belt (R. 139, 162, 176), that respondent reserved the right to demand the discharge of any Belt employee obnoxious to it (R. 112), that respondent insisted that Belt's team tracks should not be

open to other railroads in competition with respondent, even though Belt might thereby gain revenue (R. 181-182), that respondent admitted in pleadings filed with the Interstate Commerce Commission that it and the other stockholding lines "jointly controlled" Belt (R. 117-118), that respondent, along with the other stockholding lines of Belt, procured a finding from the Interstate Commerce Commission that the relationship between respondent and Belt at the time of the accident was one of agency (R. 121) in the face of a vigorous protest by the Texas & New Orleans Railroad Company, one of respondent's competitors (275 I.C.C. 289, 311), and the ultimate fact that Belt is nothing more than an instrumentality of respondent and the other stockholding lines, created to perform switching and terminal operations for them at Houston, and wholly incapable of any independent existence (R. 106-108, 124-125, 137-138), all furnish ample support for the jury's verdict. To allow the judgment of the Court of Civil Appeals to stand is to deprive petitioner of his right to a jury trial.

Conclusion

The judgment of the Court of Civil Appeals deprives petitioner and those similarly situated of the protection of the Federal Employers Liability Act. It is in the teeth of Section 5 of the Act, and also operates to deprive petitioner of his right to trial by jury. For all of said reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

OPINION

(Filed Nov. 1, 1956)

No. 6002

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, ET. AL., Appellants

vs.

PARRIS SINKLER, Appellee

Sinkler, the plaintiff in this action, was an employee of the several railroad corporations represented on this appeal and as defendants below by the Trustee. Plaintiff served as a cook on the car used by an officer of said railroad corporations in the performance of his duties. This car, with plaintiff on board as cook, was brought into the Union Depot at Houston, apparently by one of the Trustee's corporations, the St. Louis, Brownsville & Mexico Ry. Co., as one of a train of cars, and later that day, with plaintiff again on board and again engaged in performing his duties, was moved to another track at this station. This movement was made by employees and property of the Houston Belt & Terminal Railway Company. During the course of the movement, the engineer failed to comply with a signal given him by another member of the switching crew, and in consequence the plaintiff's car was driven against another car with heavy force and the plaintiff was thrown against a part of his own car and injured. The plaintiff subsequently brought this action against the Trustee under the Federal Employers Liability Act, namely,

Sections 51 et seq., Title 45, USCA, to recover damages for these injuries, and no question has been raised concerning the application of this statute to the case. The Houston Belt & Terminal Railway Company was not a party to the suit. The cause was tried to a jury and on the jury's verdict the trial court rendered judgment for the plaintiff against the Trustee for $15,000.00. The Trustee was sued as the representative of five railroad corporations and was adjudged not liable in the case of two. He was adjudged liable as Trustee of the other three, the New Orleans, Texas and Mexico Railway Company, the Beaumont, Sour Lake & Western Railway Company and the St. Louis, Brownsville, and Mexico Railway Company. From the trial court's judgment the Trustee has appealed.

The Houston Belt & Terminal Railway Company was at the time of the plaintiff's injury and still is a corporation, separate and distinct in form from the various railroad corporations represented by the Trustee. The plaintiff was injured on the Belt's track, its property, and his injury, as our statement shows, was caused by the Belt's employees. These employees, again, were subject to, and only to, the direction and control of the Belt's officers and were switching the plaintiff's car pursuant to a contract between the Belt and the corporations represented by the Trustee which purported to make the Belt an independent contractor for the purpose, among other matters, of and while switching cars, including the plaintiff's car, of the other parties. It appears, therefore, that the trial court's judgment is erroneous and must be reversed unless the Belt actually was not an independent contractor or unless the Belt's status as an independent contractor is not material.

It is contended by the plaintiff under his second counterpoint that the Belt was a separate corporation in form only and being so, was no more than an agent of the Trustee's corporations for whose negligence the Trustee would now be liable. And in response to Issue 3, the jury found that in switching the plaintiff's car the Belt was "acting as agent" for the Trustee's corporations adjudged liable, and in response to Issue 4, found that a preponderance of the evidence did not show that the Belt was an independent contractor in switching the plaintiff's car. The trial court defined "agent", in part, as one, the details of whose work was subject to his principal's control, and defined "independent contractor", in part, as one, the details of whose work was not subject to his employer's control.

The defendant contends that these findings are without support in the evidence.

The evidence shows that the Belt, a Texas corporation, received its charter in 1905 and that all of its stock was subscribed by four railroad corporations, each subscribing for 25% of the whole. Two of these, namely, the Beaumont, Sour Lake & Western and the St. Louis, Brownsville & Mexico, were adjudged liable to the plaintiff as we have stated, and by the Trustee are appellants here. The other corporation adjudged liable to plaintiff, namely, the New Orleans, Texas & Mexico, has never owned any of the Belt's stock but does own all, or approximately all, of the stock of the two corporations just named. Another of the subscribing corporations, the Gulf, Colorado & Santa Fe Railway Company, continues to own its original stock; but the stock subscribed by the fourth company, the Trinity & Brazos Valley Railroad Company, was owned at

the time of the plaintiff's injury by two other railroad corporations which were a part of the Rock Island System. These were the Fort Worth & Denver and the Chicago, Rock Island and Pacific. The plaintiff does not question the legality of the Belt's incorporation or the right of the proprietary lines to own the Belt's stock.

The proprietary lines have exercised their right as stockholders to elect the Belt's board of directors. When the plaintiff was hurt, this board had eight members and each of the proprietary lines (treating the Rock Island lines as one) had elected two members of this board. All of these directors were officers of, or were affiliated in some way with, the corporations which elected them, and three of these eight directors were the President and the two Vice Presidents of the Belt. Some of the subordinate officers of some of the proprietary lines had served at times as officers of the Belt while they were also officers of proprietary lines, but the evidence does not show that this was true of all of the Belt's officers, and it was not true of the Belt's subordinate employees conducting the switching operations of the Belt. For instance, Magee, the yard master, said that he was the Belt's employee, and the Belt had made contracts with unions concerning union members who worked for it.

According to the evidence in this case, the Belt has been maintained in form as, and operated in form as, a separate corporation. Thus it acquired, by lease or purchase, and still owns the terminal grounds and tracks at the Union Depot, and it erected and still owns this depot. The funds for its original acquisitions were advanced by the proprietary lines, but the Belt reimbursed these companies from the proceeds of a $5,000,000 bond issue which it

sold to the public. The Belt, acting through its own officers and an executive committee of its board of directors made up of some of these directors, employs, pays, disciplines and discharges its own employees and determines the claims of said employees, and has made contracts with various unions concerning its employees who are members of said unions. We have mentioned instances of persons being at the same time officers of the Belt and of a proprietary line. There is nothing to show that these persons were not freely appointed by officers of the Belt acting on their own discretion. The Belt operates twenty-two diesel locomotives, at least some of which it owns, and owns and leases numerous other items of equipment used in its business. It employs a purchasing agent, and its purchases are made pursuant to authority granted by the executive committee of the Belt's Board of Directors. The Belt has in effect its own tariffs, approved by the Interstate Commerce Commission and by the Texas Railroad Commission, of the charges it makes to railroads other than its proprietary lines (and lines whose charges are controlled by contract) for switching operations. The principal part of the Belt's business is to switch cars, both for its proprietary lines and for other lines using its facilities, and all this it does with its own equipment, operated and directed by its own employees.

The evidence so far stated shows that the proprietary lines did nothing more than what stockholders are authorized to do, and the evidence relied upon by the plaintiff to sustain his contention that the Belt was no more than an instrumentality or department of the proprietary lines seems to us to go no further. This evidence, with our comments thereon, consists of the following matters:

(1) In the contract between the Belt and its proprietary lines, in force when the plaintiff was hurt, the Belt agreed, on the written demand of any of the proprietary lines, to dismiss any officer or employer of the Belt which said proprietary line deemed incompetent, negligent or guilty of unfairness or discrimination. This provision respects the corporate identity of the Belt; it is the Belt, not the complaining stockholder, which is to discharge the employee. Furthermore, it is to be borne in mind that the *Belt is the Houston terminal of its proprietary lines and that the Belt performs all of the switching services at Houston required by its proprietary lines.* According to the evidence in this case, this provision of the contract seems to be proper as one for the protection of the proprietary lines. We have not considered the question, whether the complaining proprietary must have some basis in fact for its demand.

(2) The application of the Belt and its proprietary lines to the Interstate Commerce Commission for authority to perform certain acts contains statements that the proprietary lines *control* the Belt. The Commission's opinion describes the service rendered by the Belt and states that "such service at present is performed by the Belt for the proprietary carriers as their *agent*" under an agreement which was the one in force when plaintiff was hurt. The agreement between the Belt and its proprietary lines which this opinion of the Interstate Commerce Commission approved (and which supplanted the agreement in force when the plaintiff was hurt) refers to the proprietary lines and two others as "using lines" and provides that the Belt shall perform service for these lines "as agent" for said lines. The plaintiff also proved the title of a section of this contract but did not prove the contract provision itself.

All of the statements we have referred to are in general terms and there is nothing in addition to the expressions themselves which defines them. It does not appear that any question or issue arose in the Interstate Commerce Commission concerning the nature of the Belt's agency or the proprietary lines' control, or that the parties had in mind, or that the Commission was required to make, any distinction between servant and independent contractor. These general statements respecting *agency* and *control* are consistent with the evidence showing how the Belt was owned and operated. As stockholders, the proprietary lines did have a power of control over the Belt, and since the Belt actually did all of the switching of cars at Houston for the proprietary lines it was in a sense their agent for that purpose, and in this sense the proprietary lines *used* the Belt and its facilities, as they did when they ran their passenger trains into the Union Depot. Furthermore, the term "agent" as used in these expressions is only a legal conclusion. So, under all these circumstances, the evidence which shows how the Belt was actually operated should be given the effect of controlling and explaining the general statements referred to.

(3) The Trustee and the corporations he represents on this appeal were not parties to U. S. v. Houston Belt & Terminal Railway Company, 210 Fed. 2d 421, and, too, the opinion of the Court recognizes the Belt as a separate corporation and terms it a common carrier. The Trustee and the corporations he represents also were not parties to Texas & N. O. R. Co. v. Houston Belt & Terminal Railway Company, 227 S.W. 2d 610, and the difference between servant and independent contractor seems not to have been involved in that case. Respecting the Belt's con-

tention of agency in these cases, see the comments in the two paragraphs immediately preceding this. The aid which the Belt has furnished its proprietary lines to give them an advantage over the competing T. & N.O., referred to both in the decision last cited and in the testimony of the witness Schill, indicates an association or joint action more strongly than an agency, actual or constructive. It is not necessarily proof of domination that a corporation gives a preference to its own stockholders.

(4) The Belt operates at a deficit and this the proprietary lines pay. Too, no extra charge to a shipper of freight is made by a proprietary line for the switching service performed by the Belt, nor does the Belt charge the proprietary lines the rate fixed by its tariff for its services. Instead, the net expense of the Belt, that is, the deficit, is determined each month and is then divided among the proprietary lines according to the extent of the service rendered each line by the Belt. Thus the division is not arbitrary, and the way in which it is made and the sums owed are paid respects the separate identity of the Belt. It is the Belt which determines the sum each line is to pay, and the Belt renders each line a bill for its part and collects this sum. These circumstances might have more weight in connection with other circumstances showing a disregard of the Belt's identity, but considered alone these various arrangements are such as the Belt might reasonably make with its own stockholders and yet continue its separate existence. After all, if the Belt charge full tariff and make a profit, this goes back to the ones who paid it—unless a tax be first deducted. We are assuming that the arrangement violates no rule of law and does not deprive the Belt of assets needed to pay its obligations, including one such as plaintiff's judgment.

These various matters relied on by the plaintiff to prove the Belt only an instrumentality seem to us to support the findings to Issues 3 and 4 no more when considered together than when considered separately. See Friedman v. Vandalia Railroad Company, 254 Fed. 292, p. 294.

The real question raised by the plaintiff's contention that the Belt is only an instrumentality of the proprietary corporations is whether the Belt's corporate identity shall be disregarded and the Belt treated as being, in legal effect, no more than a part of the proprietary lines. This the courts will not do merely because the proprietary corporations own all of the Belt's stock (we repeat, the legality of this ownership is unquestioned) nor because, in addition, there are interlocking directorates and some officers in common. For the proprietary corporations to be liable for the plaintiff's injury on the theory propounded by the plaintiff, these corporations must exceed their powers and rights as stockholders and, acting through their own officers, conduct and manage the Belt's affairs instead of leaving these matters to the decision of the Belt's own officers, freely acting as officers of the Belt. In Pullman's Palace Car Company v. Missouri Pacific Railway Company, 29 L. Ed. 499, at p. 502, the court said: "The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the Company, but the Company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the govern-

ing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the Directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election at a proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and powers are those of a stockholder. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property." See also: Peterson v. Chicago, R.I. & Pacific Railroad Company, 51 L. Ed. 841; Kingston Dry Dock Company v. Lake Champlain Transportation Company, 31 Fed. 2d 265; Berkey v. Third Avenue Railway Company, 155 N.E. 58, 50 A.L.R. 599; State v. Swift & Company, 187 S.W. 2d 127; Fletcher Cyclopedia Corporations, Sec. 43, p. 155 et seq., Sec. 4878, p. 353.

Doubtless the exercise of control over the subsidiary's affairs which constitutes the latter a mere instrumentality of the stockholder corporations may be proved by circumstances; but the evidence in this case is not sufficient to show that the Belt's proprietary lines exercised such a control over the Belt. We sustain the Trustee's contention, and to this extent we sustain his Points I to V, inclusive. The plaintiff's Counter-point 2 is overruled.

The plaintiff contends further that it is not material whether the Belt was an independent contractor or in legal effect a mere servant because, it is argued, the plaintiff's employers had delegated to the Belt the performance of an absolute and non-delegable duty which they owed the plaintiff as their employee. In plaintiff's first counterpoint, this non-delegable duty is identified as one to furnish a safe place to work, although with this the plaintiff has coupled another matter which we deem a separate ground of liability. We agree with the defendant that no violation of the duty to provide a safe place to work was proved. There is no evidence of any defect in the plaintiff's car, or in the track over which it moved, or for that matter in the equipment involved in the moving of this car. It was the negligent performance of the switching operation, the conduct of one or more members of the switching crew, which caused the plaintiff's injury. Labatt's Master & Servant states as follows the general rule of decision before the enactment of statutes affecting this rule (particularly these concerned with the fellow servant rule and the matter of assumption of risk): 'All the authorities are agreed as to the general proposition that a master who has furnished a reasonably safe place to work in—can not be held liable to a servant whose co-servant has, by his negligence, rendered that place—unsafe, without the master's fault or knowledge." Section 1515, p. 4540, 2nd Edition. For Texas decisions, see: Galveston, H. & S.A. Ry. Co. v. Waldo, 119 Tex. 377, 29 S.W. 323; San Antonio Brewing Ass'n v. Sievert, 182 S.W. 389; Wells Fargo & Co. v. Page, 68 S.W. 528. Also see: 29 Tex. Jur. 189, Sec. 104; 35 Am. Jur. 784, Sec. 359; 56 C.J.S. 1111, Sec. 333, C. (1) and p. 1114, Sec. c. (3).

However, the argument under the plaintiff's first counterpoint, and the counterpoint itself, involve another ground of liability, namely, a delegation by the Trustee's corporations to the Belt of the performance in part of franchises which the State of Texas has granted the Trustee's corporations. The right of franchise said to be performed by the Belt is the switching of cars. The City of Houston is one of the points to and from which the Trustee's corporations and the other proprietary lines carry passengers and freight, and these passengers are delivered and taken up at the Belt's depot, and the carriage of freight into and out of Houston also involves the use of the Belt's facilities. We infer that the Trustee's corporations and the proprietary lines take their trains into and out of the Belt's tracks, but all switching of cars at Houston, both passenger and freight, for the Trustee's corporations and for the proprietary lines is performed by the Belt. In this sense it may be said that the Belt is performing, in part, a service which the other railroad corporations mentioned were enfranchised to perform.

However, as we have stated, the plaintiff was injured in a switching operation, and this operation occurred and plaintiff was injured on the Belt's own property, not on property belonging to any of the Trustee's corporations, and was performed by the Belt's own employees, operating the Belt's equipment.

Furthermore, we have held that the Belt is to be treated as a corporation separate and distinct from the Trustee's corporations, and we have mentioned the Belt's tariff of charges, approved by Interstate Commerce Commission and Texas Railroad Commission.

Still further, the plaintiff does not question the legality of the agreement under which the Belt switches cars for the Trustee's corporations, or the legality of this service itself.

All this being true, we shall have to deal with the plaintiff's contention on the assumption that the Belt and its switching service were authorized by law. The exact date when the Belt was incorporated was not proved, but if it received its charter in 1905 there was, in Subdivisions 21 and 53 of Chapter 130, Acts 1897, and in Chapter 109, Acts 1905, authority for the creation of such a corporation as the Belt appears to be, performing services such as the Belt has performed. And also see Subdivisions 67 and 72 of Art. 1302 and see Art. 6549, R.S. 1925.

It follows, then, that the Trustee's corporations and the other proprietary lines could lawfully delegate to the Belt such performance of their franchises as the switching service of the Belt involved. For it was to perform such services that the Legislature authorized the creation of such a corporation as the Belt appears to be; the Belt was exercising its own franchise in switching the plaint.. s car.

And, too, if the Belt can be a separate corporation and acquire, own and operate its system of tracks and depot, and if it can make a contract, all of which it evidently has lawful authority to do, it must have the right to stipulate for the powers of an independent contractor. In fact, the Belt's control of its tracks and its switching operations would seem to be necessary to the safety of every one using those tracks; and then, the Belt's officers must consider the possibility of the Belt being liable for what occurs on those tracks.

All of these railroad corporations, including the Belt, were subject to the Texas Railroad Commission and the Interstate Commerce Commission, each of these bodies having exercised jurisdiction over the Belt to the extent, at least, of approving its tariff of switching charges, and the absence of any statute specifically regulating liability is deemed immaterial. See: Missouri P.R. Co. v. Watts, 63 Tex. 549; Gulf, C. & S.F. Ry. Co. v. Miller, 98 Tex. 270, 83 S.W. 182; H.E. & W.T. Ry Co. v. Anderson, 120 Tex. 200, 36 S.W. 2d 983; Broughton v. Gulf C. & S.F. Ry. Co., 186 S.W. 354. We think that the plaintiff has shown no ground for holding that the Belt's capacity as independent contractor in switching plaintiff's car should be disregarded.

Plaintiff's counterpoint 1 and the contentions made thereunder are denied.

These comments adjudicate the contentions made by the plaintiff in support of the judgment and it is unnecessary to discuss other contentions made by the Trustee. But all of the facts pertaining to the plaintiff's contentions respecting non-delegable duty are undisputed and we are not satisfied that the petition, in the absence of an exception, is insufficient to support these contentions. Therefore, we have decided these contentions on their merits. Since our conclusions require a reversal of the trial court's judgment, that judgment is hereby reversed, and it appearing that the cause has been fully developed judgment is rendered that plaintiff take nothing against the Trustee and the corporations he represents on this appeal.

Charles B. Walker,
Associate Justice

NO. 6002

GUY A. THOMPSON, TRUSTEE, ET AL.

v.

PARRIS SINKLER

JUDGMENT - NOVEMBER 1, 1956

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of the court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and such judgment is here rendered as should have been entered by the court below, as follows, to wit:

It is the order, judgment and decree of the court that the judgment of the trial court be reversed and judgment is here rendered that the appellee, Parris Sinkler, take nothing by his suit against Guy A. Thompson, Trustee, and the corporations said trustee represents on this appeal, to wit: New Orleans, Texas and Mexico Railway Company, debtor, The St. Louis, Brownsville and Mexico Railway Company, debtor, and The Beaumont, Sour Lake & Western Railway Company, debtor; that the appellee, Parris Sinkler, pay all costs of this appeal; and this decision be certified below for observance.

APPENDIX "B"

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to

enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (18)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier". The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable division thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(18) *Extension or abandonment of lines; certificates required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.